# Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra v Yang Maha Mulia Pemangku Raja Kelantan & Ors

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R3–25–379 OF 2009
MOHAMAD ARIFF J
29 JANUARY 2010

*Administrative Law — Exercise of judicial functions — Judicial review — Justiciability — Whether judicial review appropriate procedure for deciding matters pertaining to royal succession*

*Administrative Law — Judicial review — Application for leave — Principles to be considered in granting leave — Whether case fit for further consideration*

*Constitutional Law — Sovereignty — Whether court has jurisdiction over matters pertaining royal succession — Application for judicial review to challenge decision of Regent of Kelantan in altering membership of Kelantan Council of Succession — Whether matter non-justiciable*

*Constitutional Law — Sovereignty — Whether Regent, acting during Sultan's incapacitation entitled to assume for himself full powers of Sultan — Royal prerogatives of Regent to appoint or revoke appointment of members of Council of Succession*

*Constitutional Law — Suit involving government or Rulers — Jurisdiction — Whether court has jurisdiction over matters pertaining to royal succession — Application for judicial review to challenge decision of Regent of Kelantan in altering membership of Kelantan Council of Succession — Whether matter non-justiciable*

*Words and Phrases — 'Non-justiciability' — Whether court of law or court process ill-suited to decide issue — Whether matter insulated from judicial determination*

The applicant applied for judicial review to challenge the decision of the Regent of Kelantan, his elder brother, who had drastically altered the membership of the Kelantan Council of Succession ('the Council') by removing the applicant from its membership and appointing the fourth to

A eighth respondents as members. The applicant's main objection to the decision was that only the Sultan of Kelantan could alter the composition of the Council, and as such the Regent's actions amounted to an usurpation of the Sultan's powers. The applicant intended to obtain a wide range of remedies to include orders of certiorari, declarations, mandamus, quo warranto, injunction and damages. The prayers fell into two parts, namely those relating to the revocation of the applicant's membership of the Council and those relating to the appointments of the fourth to eighth respondents as members of the Council. The dispute concerned on a matter of Royal Succession. It was argued that not only had the Regent no constitutional power to do as he did, but what was done did not accord with the wishes of the Sultan. During the applicant's application for leave to apply for judicial review, senior federal counsel had raised an objection on the issue of justiciability.

D **Held**, dismissing the application with costs:

(1) When the court hears the application for leave on an inter partes basis, the court needs to be satisfied that 'there is a case fit for further consideration'. Generally leave will be refused only where an application is: (i) frivolous and vexatious or hopeless; (ii) made by busybodies with misguided or trivial complaints of administrative errors; (iii) misconceived; (iv) unarguable or groundless; (v) where there is a more appropriate alternative procedure; or (vi) where an application for judicial review is an inappropriate procedure (see paras 4 & 7).

(2) Justiciability relates to the issue of whether judicial review is an appropriate procedure. An issue is regarded as non-justiciable where a court of law or the court process is ill-suited to decide the issue by reason of lack of competence, unsuitability of the legal method, lack of satisfactory criteria for a judicial determination of the dispute at hand, or where constitutional, common or statutory laws expressly or contextually insulate it from judicial determination (see para 8).

(3) The Regent is intended to be constitutionally vested with all the necessary powers of the Sovereign during the period of incapacitation. The context certainly does not exclude the exercise of powers under art VII of the Laws of the Constitution of Kelantan. Nevertheless, this power is temporary in nature and exists only during the period of incapacitation of the Sovereign (see para 9).

(4) The subject matter of the present application for leave for judicial review was inherently non-justiciable. In a matter such as this, the proper forum to resolve the dispute would be the Sultan himself, once His Royal Highness is no longer incapacitated (see para 30).

**[Bahasa Malaysia summary**

Pemohon memohon untuk semakan kehakiman untuk mencabar keputusan Tengku Mahkota Kelantan, abang sulungnya, yang secara drastik mengubah keahlian Majlis Perajaan Negeri ('Majlis') dengan menyingkirkan pemohon daripada keahliannya dan melantik responden-responden keempat hingga kelapan sebagai ahli. Bantahan utama pemohon terhadap keputusan adalah bahawa hanya Sultan Kelantan boleh mengubah komposisi Majlis, dan oleh itu tindakan Tengku Mahkota seperti merampas kuasa Sultan. Pemohon berniat untuk mendapatkan berbagai-bagai remedi termasuk perintah certiorari, perisytiharan-perisytiharan, mandamus, quo warranto, injunksi dan ganti rugi. Permohonan terdiri daripada dua bahagian, iaitu apa-apa yang berkaitan kepada pembatalan keahlian Majlis pemohon dan apa-apa yang berkaitan kepada pelantikan responden-responden keempat hingga kelapan sebagai ahli Majlis. Pertikaian tersebut berkaitan perkara Pewarisan Raja. Ia dihujahkan bahawa bukan saja Tengku Mahkota tidak mempunyai kuasa perlembagaan untuk melakukan seperti yang dilakukan olehnya, tetapi apa yang dilakukan tidak selaras dengan kehendak Sultan. Semasa permohonan pemohon untuk keizinan bagi memohon semakan kehakiman, peguam kanan persekutuan telah membangkitkan bantahan atas isu bidang kuasa mahkamah.

**Diputuskan**, menolak permohonan dengan kos:

(1) Semasa mahkamah mendengar permohonan untuk keizinan atas dasar inter partes, mahkamah perlu diyakinkan bahawa 'there is a case fit for further consideration'. Secara umum keizinan akan ditolak hanya apabila permohonan adalah (i) remeh dan menyusahkan atau tidak berguna langsung; (ii) dibuat oleh orang yang suka mencampuri urusan orang lain tanpa usul periksa atau aduan yang remeh-temeh tentang kesilapan pentadbiran; (iii) salah tanggap; (iv) tidak dapat dipertikaikan atau tidak berasas; (v) di mana terdapat prosedur alternatif yang wajar; atau (vi) di mana permohonan untuk semakan kehakiman adalah prosedur yang tidak wajar (lihat perenggan 4 & 7).

(2) Bindang kuasa mahkamah adalah berkaitan isu sama ada semakan kehakiman merupakan prosedur yang wajar. Sesuatu isu dianggap tiada berbidang kuasa apabila mahkamah atau proses mahkamah adalah tidak sesuai untuk memutuskan isu tersebut atas sebab tidak terdapat kompetens, cara undang-undang tidak sesuai, tidak terdapat kriteria yang memuaskan untuk penentuan kehakiman terhadap pertikaian yang sedia ada, atau di mana undang-undang berpelembagaan, biasa atau statutori secara nyata atau mengikut konteks memisahkannya daripada penentuan kehakiman (lihat perenggan 8).

(3) Tengku Mahkota berniat diletakhakkan secara perlembagaan dengan kesemua kuasa Raja semasa tempoh ketidaklayakan. Konteksnya pasti tidak mengecualikan kuasa-kuasa di bawah perkara VII Undang-Undang

Perlembagaan Tubuh Kerajaan Kelantan. Walau bagaimanapun, kuasa ini adalah bersifat sementara dan wujud hanya semasa tempoh Raja tidak berupaya (lihat perenggan 29).

(4) Perkara permohonan ini untuk keizinan semakan kehakiman adalah secara inherens tidak berjustifikasi. Dalam perkara seperti ini, forum yang betul untuk menyelesaikan pertikaian adalah Sultan sendiri, apabila Duli Yang Maha Mulia bukan lagi tidak berupaya (lihat perenggan 30).]

**Notes**

For cases on constitutional law generally, see 3(1) *Malall's Digest* (4th Ed, 2010 Reissue) paras 1871–2421.

For cases on judicial review, see 1 *Malall's Digest* (4th Ed, 2005 Reissue) paras 119–132.

For cases on judicial review generally, see 1 *Malall's Digest* (4th Ed, 2005 Reissue) paras 190–218.

For cases on jurisdiction, see 3(1) *Malall's Digest* (4th Ed, 2010 Reissue) paras 2414–2415.

**Cases referred to**

*Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228; [1990] 2 CLJ 734, SC (refd)

*Bandar Utama Development Sdn Bhd & Anor v Lembaga Lebuhraya Malaysia & Anor* [1998] 1 MLJ 224; [1997] 4 CLJ 725, HC (refd)

*Bavandra v Attorney-General* [1988] LRC 13, SC (refd)

*Council of Civil Service Union and others v Minister for the Civil Service* [1984] 3 All ER 935; [1985] 1 AC 374, HL (folld)

*Dato Menteri Osman Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, FC (refd)

*DYTM Tengku Idris Shah Ibni Sultan Sallahuddin Abdul Aziz Shah v Dikim Holdings Sdn Bhd & Anor* [2002] 2 MLJ 11; [2002] 2 CLJ 57, FC (refd)

*Dr Amir Hussein bin Baharuddin v Universiti Sains Malaysia* [1989] 3 MLJ 298, HC (refd)

*Juraimi bin Husin v Pardons Board, State of Pahang & Ors* [2002] 4 MLJ 529; [2002] 4 CLJ 529, FC (refd)

*Queen, The v Chiasson* (2003) 226 DLR (4th) 351, FC (distd)

*Stephen Kalong Ningkan v Government of Malaysia* [1968] 1 MLJ 119, FC (refd)

*Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494; [1986] CLJ 256 (Rep), SC (refd)

*Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd* [1995] 2 MLJ 442, SC (refd)

**Legislation referred to**

Bravery Decorations Regulations 1996 [CAN]
Federal Constitution art 181(1)
Laws of the Constitution of Kelantan First Part, arts IV, IV(1), LXII, Second Part, arts VII, XXIIA, XXIII(1), LII
Rules of the High Court 1980 O 53 r 3(2)

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*Azizah Nawawi (Senior Federal Counsel, Attorney General's Chambers) for the third respondent.*

**Mohamad Ariff J:**

RULINGS AND DECISION

**[1]** This is my ruling on the question of whether the subject matter of this application is justiciable.

**[2]** On the first day of hearing of encl 1, namely the applicant's application for leave to apply for judicial review, senior federal counsel had raised an objection on the issue of justiciability. I had subsequently heard counsel for the respondents, after considering their application to be heard at this stage of leave application, on the question of excessive delay in the application. In the course of ruling that I should hear the application to extend time in relation to delay inter partes, I had invited counsel for the respondents to also address this court on the issue of justiciability, since all parties were before the court and it would be in the interests of justice to hear the arguments from all parties. After all, this issue of justiciability was already before this court from the first day of hearing, it being raised by senior federal counsel as a ground of objection.

**[3]** The parties are in agreement that the decision of this court on justiciability would be the threshold question; if this court were to decide that the subject matter of the section is not justiciable, it will determine and affect the question whether leave should be granted. In this regard, the question of delay becomes a secondary question to be decided after this court has addressed and ruled on the issue of justiciability.

**[4]** At this stage, when the court hears the application for leave on an inter partes basis, the court needs to be satisfied that 'there is a case fit for further consideration' (*Bandar Utama Development Sdn Bhd & Anor v Lembaga Lebuhraya Malaysia & Anor* [1998] 1 MLJ 224; [1997] 4 CLJ 725).

**[5]** The tests to be applied at the stage of leave application are well laid down in cases such as *Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd* [1995] 2 MLJ 442, *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228; [1990] 2 CLJ 734 and *Dr Amir Hussein bin Baharuddin v Universiti Sains Malaysia* [1989] 3 MLJ 298.

**[6]** In *Dr Amir Hussein bin Baharuddin*, for example, it was said that the court should be concerned to see whether 'prima facie there is a genuine case for review'. It is accepted that the threshold requirement is low.

**[7]** Generally therefore leave will be refused only where an application is:

(i) Frivolous and vexatious or hopeless;

(ii) Made by busybodies with misguided or trivial complaints of administrative errors;

(iii) Misconceived;

(iv) Unarguable or groundless;

(v) Where there is a more appropriate alternative procedure; or

(vi) Where an application for judicial review is an inappropriate procedure — see De Smith, Woolf and Jowell, *Judicial Review of Administrative Actions* (5th Ed) 1995, pp 662–663.

THE CONCEPT OF JUSTICIABILITY

**[8]** Justiciability relates to the sixth ground stated above — whether judicial review is an appropriate procedure. It can be subsumed even under grounds (v) and (iv). The issue can also be stated as whether the subject matter is 'amenable to judicial process', a phrase which appears in the House of Lords decision in *Council of Civil Service Unions and others v Minister for the Civil Service* [1984] 3 All ER 935; [1985] 1 AC 374, per Lord Roskil. Generally, an issue is regarded as non-justiciable where a court of law or the court process is ill-suited to decide the issue by reason of lack of competence, unsuitability of the legal method, lack of satisfactory criteria for a judicial determination of the dispute at hand, or where constitutional, common or statutory laws expressly or contextually insulate it from judicial determination.

**[9]** The learned authors of Duma Das Basu's *Human Rights in Constitutional Law* (2nd Ed, Reprint 2005) observe with deserving scholarship as follows:

Limits of Judicial Review of Executive Acts

Even where it appears *prima facie* that some fundamental right has been violated by an Executive Act, the Court cannot interfere with that act on the ground of unconstitutionality because of general principles relating to the limits of the judicial method and the rule of the judiciary, and the lack of satisfactory criteria for a judicial determination of certain questions.

Non-justiciable Issues

In connection with the unconstitutionality of legislation, we have seen that even where a fundamental right has been invaded by a statute, the individual who is affected thereby may not have a remedy from a Court of Law, because the issue involved is not justiciable.

... The most prominent amongst non-justiciable issues are those which are known in the U.S.A. as 'political questions', which means that the subject matter of the question is such that it is not capable of a judicial determination (at p 256).

**[10]** The learned authors of *De Smith's Judicial Review* (6th Ed) have also appropriately observed in this connection that despite the wholesome development of administrative law, 'the fact remains, however, that there are some issues which are inherently unsuited to adjudication' and in this category of case, 'the Court acknowledges that the litigation process and the expertise of the Court are unsuited to resolving the question in hand'. (at p 121).

**[11]** A good definition of 'justiciability' can also be found in Chris Finn, *The Concept of 'Justiciability' in Administrative Law* in Groves & Lee, *Australian Administrative Law* (2007):

The term 'justiciability' refers to the suitability for, or amenability to, judicial review of a particular administrative decision or class of decisions. The term derives from the common law and reflects a series of self-imposed judicial restraints, themselves founded in a view as to the appropriate constitutional balance between the respective roles of the executive and the judiciary. Thus, a matter may be deemed 'non-justiciable' by a Court which feels that its resolution either is beyond the institutional competence of the Court or would involve stepping outside its appropriate constitutional role. (at p 143).

**[12]** From these introductory general principles I now turn to the facts of this current application.

**[13]** The important question to ask on the facts of this present application is whether the subject matter before this court is a fit, proper or suitable matter for judicial review. With these basic premises, I now consider the nature and substance of this present application.

A NATURE AND SUBSTANCE OF APPLICATION

**[14]** This application for leave to apply for judicial review is filed to obtain a wide range of remedies to include orders of certiorari, declarations, mandamus, quo warranto, injunction and damages, in addition, of course, the costs of the application. The prayers fall into two parts, namely those relating to 'the revocation' and those relating to 'the appointments'. To summarise, the applicant's challenge concerns his revocation from his membership of the Kelantan Council of Succession ('Majlis Perajaan Negeri Kelantan') by the first respondent, His Royal Highness the Regent of Kelantan, as well as the appointments by His Royal Highness the Regent of the fourth to eighth respondents as members of the Kelantan Council of Succession. The prayers I have just summarised read in detail as follows:

> A. The Applicant be granted leave to apply for judicial review under Order 53 rule 3 of the Rules of the High Court 1980 for the following orders:
>
> 1. The Revocation
>
> 1.1 An order of certiorari to remove the decision by the First Respondent Regent of Kelantan to revoke the appointment of the Applicant from its Membership of the Kelantan Council of Succession as communicated to the Applicant by the Second Respondent's Secretary of the Kelantan Council of Succession by his letter dated 16th September 2009 ... into the High Court to be quashed forthwith;
>
> 1.2 Further or in the alternative, a declaration that the revocation is ultra vires and/or contrary to and/or inconsistent with Article VII of the Laws of the Constitution of Kelantan, Second Part and is therefore null and void and of no effect;
>
> 1.3 Further or in the alternative, and order in the nature of mandamus requiring the First to Third Respondent's to restore the Applicant to his position in the Council of Succession and to restore all his rights, privileges and honours consequential thereto;
>
> 1.4 Further or in the alternative, a declaration that the Applicant remains a lawful Member of the Council of Succession;
>
> 1.5 The damages suffered by the Applicant as a result of the revocation be assessed and paid to the Applicant by the First to Third Respondent's and each of them;
>
> 2. The Appointments
>
> 2.1 An order of certiorari to remove the decision by the First Respondent Regent of Kelantan to appoint [the Fourth to Eighth Respondents] to the Kelantan Council of Succession vide KNG.N.1379 of 1009 dated 24th of September 2009 and published in the Kelantan Gazette dated the 22nd October 2009 ... into the High Court to be quashed forthwith;

2.2 Further or in the alternative, an order that the writ in the nature of quo warranto be issued to the Fourth to Eighth Respondents and each of them ordering the Fourth to Eighth Respondents and each of them to show cause and give information as to how and on what basis and authority the Fourth to the Eighth Respondents are purportedly entitled to lawfully occupy their respective positions in the Kelantan Council of Succession, and purportedly act or exercise their rights, privileges, obligations, functions and duties in such positions.

2.3 Further or in the alternative, a declaration that the appointments or each of them are ultra vires and/or contrary to and/or inconsistent with Article VII of the Laws of the Constitution of Kelantan, Second Part and are therefore null and void and of no effect;

2.4 Further or in the alternative, an order in the nature of mandamus requiring the Respondents to forthwith discharge and revoke the appointments of the Fourth to Eighth Respondents and each of them from the said positions in the Council of Succession;

2.5 Further or in the alternative, an injunction order restraining the Fourth to Eighth Respondents and each of them from further occupying the positions of the Council of Succession and from exercising any of the rights, duties of privileges of a Member of the Council of Succession.

3. Further or in the alternative, a declaration that any decision taken by the Council of Succession from 16th of September 2009 until the hearing and dissolution, in the absence of the Applicant, be declared null and void and of no effect ...

B. Interim relief in the form of an order to stay all proceedings under and incidental to the revocation and appointments until the hearing and final disposal of this application for judicial review ...

**[15]** The case for the applicant, as argued in the applicant counsel's submission, makes it clear that the applicant applies for judicial review to challenge the decision of the Regent of Kelantan, his elder brother, who has drastically altered the membership of the Kelantan Council of Succession by removing the applicant from its membership and appointing the fourth to eighth respondents as members. The applicant's main objection to the decision is also stated. It is based on the argument that only His Royal Highness the Sultan of Kelantan can alter the composition of the Kelantan Council of Succession, and as such the Regent's actions amount to a usurpation of the Sultan's powers. The 'basic premise' of the applicant's argument is also stated as being 'straightforward', and it runs as follows. The Regent holds office only for so long as the Sultan is incapacitated. The Regent is the first in line to succeed to the throne of Kelantan but the succession is not automatic. His Royal Highness the Regent must first be confirmed as the reigning Sovereign by the Council of Succession. If he is not confirmed, his younger brother the Tengku Bendahara, as a second heir, is entitled to be confirmed by the Council. If that

is not done, then the applicant as Tengku Temenggong will be the next in line to succeed. Article XXIII(1) of the Laws of the Constitution of Kelantan, Second Part, provides that if the Sultan is away from the state for more than a year, a successor shall be chosen and appointed in accordance with the provisions of the Constitution, unless it seems to the Council of Succession that the prolonged absence of the Sultan is due to sufficient and excusable cause. It is then argued that allowing the Regent to alter the composition of the Council and to alter appointments made by His Royal Highness the Sultan effectively allows the Regent to create the tribunal that is to be his 'judge' in determining his fitness to succeed to the throne, and such interpretation cannot be correct as it goes against the basic tenet of administrative law that no person shall be a judge in his own cause.

**[16]** In the course of submission, another piece of evidence was introduced in the fourth affidavit of the applicant affirmed on 21 January 2010. A 'Titah' or 'Royal Command' of HRH the Sultan was introduced, which carried the thumbprint of His Royal Highness and issued from Mount Elizabeth Hospital, Singapore where His Royal Highness is presently hospitalised. The Royal Command, in its relevant parts, states:

> Bahawa Beta telah memaklumkan bahawa beberapa tindakan telah diambil oleh Yang Teramat Mulia Tengku Muhammad Faris ibni Sultan Ismail Petra, Tengku Mahkota Kelantan selaku Pemangku Raja Kelantan ... yang antara lain membabit atau adalah berkenaan pihak-pihak yang merangkumi ahli-ahli Majlis Perajaan Negeri. Beta dengan ini menitahkan bahawa Beta:
>
> (a) Tidak iktiraf;
>
> (b) Tidak setuju; dan/atau
>
> (c) Tidak mengesahkan
>
> apa-apa surat dan/atau arahan bersabitan dengan pembatalan dan/atau perlantikan keahlian mana-mana pihak di dalam Majlis Perajaan Negeri kecuali dan melainkan ianya dititah perintahkan oleh Beta secara peribadi (iaitu bukan Pemangku) dan oleh itu ahli-ahli Majlis Perajaan Negeri hendaklah dikembalikan kepada keadaan sediakala sepertimana ianya pada atau sejurus sebelum 24 Mei 2009 ...

ISSUE OF SUCCESSION

**[17]** This is how the dispute brought before this court has unfolded, and is unfolding. The dispute concerns and touches on a matter of Royal Succession. This has to be since the immediate challenge concerns revocation and appointment of membership of the Kelantan Council of Succession. Further, it is now argued that not only has the Regent no constitutional power to do as he did, but what was done did not accord with the wishes of HRH the Sultan. Prima facie, this dispute and application should be regarded as non-justiciable

on the principles I have outlined in the beginning. Moving on from first principles to constitutional, statutory and case authorities, it has been affirmed by the leading case of *Dato Menteri Osman Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, a decision of the Federal Court, that in a matter of succession of a Ruler, the court is forum non-conveniens. Raja Azlan Shah Ag LP (as His Royal Highness then was) held in a majority judgment in that case:

> This court, being the highest court in the land in constitutional matters should take the occasion to reaffirm expressly, unequivocally and unanimously the constitutional position of the Ruler in matters of succession including the election of the Undang and hold that it is non-justiciable. Here is something basic to our system of government: the importance of holding it far transcends the significance of any particular case. ... it is open to the courts of this country to refuse remedy on the ground that it is forum non-conveniens. This doctrine is that court may decline to exercise jurisdiction on the ground that another body would be more appropriate (at p 33).

**[18]** The Federal Court rightly held that the 'Dewan Ka'adilan dan Undang' of Negeri Sembilan was a far more suitable forum to decide on a matter of Royal Succession, not a court of law. In issue is the question of the 'sovereignty, prerogatives, powers and jurisdiction' of the Malay Rulers, as preserved and recognised by the Federal Constitution and the state Constitutions. Article 181(1) of the Federal Constitution is the pertinent provision and it reads:

> Subject to the provisions of this Constitution, the Sovereignty, prerogatives, powers and jurisdiction of the Rulers and the prerogatives, powers and jurisdiction of the ruling Chiefs of Negri Sembilan within their respective territories as hitherto had and enjoyed shall remain unaffected.

**[19]** Article LXII of the Laws of the Constitution of Kelantan, First Part, expresses the reservation of the prerogatives of His Royal Highness in the following terms:

> Except as expressed herein, this part shall not affect the prerogatives, powers and jurisdiction of His Royal Highness.

**[20]** The Laws of the Constitution of Kelantan, Second Part, art LII repeats this formula with a slight variation, reading:

> Except as expressed herein, this Part shall not affect the prerogatives, power and jurisdiction of the Sovereign.

**[21]** In the case of *DYTM Tengku Idris Shah Ibni Sultan Sallahuddin Abdul Aziz Shah v Dikim Holdings Sdn Bhd & Anor* [2002] 2 MLJ 11; [2002] 2 CLJ 57, it was recognised that under the Selangor State Constitution, the appointment of a Council of Regency instead of a Regent was a matter of His Royal Highness' prerogative.

CONSTITUTIONAL PROVISIONS AND MEANING OF 'HIS ROYAL HIGHNESS'

**[22]** In the course of submission, counsel for the applicant conceded that if His Royal Highness the Sultan of Kelantan exercises His Majesty's discretion to revoke an appointment or to appoint a member of the Council of Succession, it will be non-justiciable. However, a similar conclusion does not apply to a Regent. This argument is based in part on the distinction drawn in the Kelantan State Constitution between the terms 'His Royal Highness' and 'Sovereign'. The term 'His Royal Highness' does not wholly apply to a Regent. According to this argument, where the context indicates otherwise, the term His Royal Highness can only properly refer to the Sovereign, namely His Royal Highness the Sultan of Kelantan. Such being the case, the action of the Regent on the facts of this case was a violation of art VII (Second Part) of the Laws of the Constitution of Kelantan, and consequently this matter is amenable to judicial review. I quote art VII:

> The Council of Succession shall consist of the following, that is to say —
>
> (i) A President;
>
> (ii) The Deputy President;
>
> (iii) The State Secretary, who shall be the Secretary of the Council;
>
> (iv) Mufti Kerajaan;
>
> (v) Four Members of the Kerabat Di raja; and
>
> (vi) Not less than six no more than twelve other persons who shall be of the Malay race and subjects of the Ruler of the State, to be appointed by His Royal Highness by instrument under his Sign Manual and the State Seal and His Royal Highness, acting in His discretion has the right and authority to revoke the appointment or dismiss and discharge any Member of the Council of Succession.

**[23]** On its very wording, the prerogative power being a discretionary one clearly refers to a personal prerogative of His Royal Highness and therefore not a matter suitable for judicial review. Malaysian cases have on numerous occasions held that the exercise of discretion by a Ruler in certain defined situations is not justiciable. The satisfaction of the Yang di-Pertuan Agong on whether a state of emergency exists, for example, is not justiciable (*Stephen Kalong Ningkan v Government of Malaysia* [1968] 1 MLJ 119). Likewise, the

exercise of the prerogative of mercy by the Sultan of a state (*Juraimi bin Husin v Pardons Board, State of Pahang & Ors* [2002] 4 MLJ 529; [2002] 4 CLJ 529). Similarly, in *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494; [1986] CLJ 256 (Rep), it was said:

> The power of pardon or otherwise to mete out clemency is an Executive power, and in our Constitution the royal prerogative of mercy is expressly preserved by art 42 of the Constitution and is recognised ... when the Constitution has empowered the nation's highest Executive as the repository of the clemency power, the court cannot intervene and judicial review is excluded by implication (at p 269, per Eusoffe Abdoolcader SCJ).

**[24]** It is to be noted that this Supreme Court decision expressly recognised that there existed some prerogative powers which could not 'properly be made the subject of judicial review' because 'their nature and subject matter are such as not to be amenable to the judicial process' (at p 259). The House of Lords decision in *Council of Civil Service Union and others v Minister for the Civil Service* [1984] 3 All ER 935; [1985] 1 AC 374 was quoted and applied in this respect.

**[25]** In the *Council of Civil Service Union* case, Lord Roskill (whose judgment was referred to expressly) stated:

> Dicey's classic statement in the *Law of the Constitution* ... that the prerogative is 'the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown' has the weight behind it not only of the of author's own authority but also the majority of this House in the *Burma Oil Company (Burma Trading) v Lord Advocate* ... per Lord Reid. But as Lord Reid himself pointed out, this definition 'does not take us very far'. On the other hand the attempt by Lord Denning MR in *Laker Airways Ltd v Department of Trade* ... (obiter since the other members of the Court of Appeal did not take so broad a view) to assert that the prerogative 'if ... exercised improperly or mistakenly' was reviewable is, with great respect, for too wide. Lord Denning MR sought to support his view by a quotation from *Blackstone's Commentaries* ... but unfortunately and no doubt inadvertently he admitted the opening words of the paragraph:
>
> In the exercise therefore of those prerogative, which the law has given him, the King is irresistible and absolute, according to the forms of the constitution. And yet, if the consequence of that exertion be manifestly to grievance or dishonour of the kingdom, the parliament will call his advisers to a just and severe account.
>
> In short the orthodox view was at the time that the remedy for abuse of the prerogative lay in the political and not in the judicial field.
>
> But, fascinating as it is to explore this mainstream of our legal history, to do so in connection with the present appeal has an air of unreality. To speak today of the acts of the Sovereign as 'irresistible and absolute', when modern constitutional convention requires that all such acts are done by the Sovereign on the advice of and

> will be carried out by the Sovereign's Ministers currently in power is surely to hamper the continual development of administrative law by harking back to what Lord Atkin once called, albeit in a different context, the clanking of mediaeval chains of ghosts of the past ...
>
> But I do not think that that right of challenge can be unqualified. It must, I think, depend on the subject matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and appointment of Ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter is such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another (at pp 955–956 (All ER); pp 416-417 (AC)).

**[26]** As the above passage indicates, whether the exercise of a royal prerogative can be regarded as amenable to judicial review or otherwise must depend on the subject matter of the prerogative power which is exercised. And it will also depend on whether the particular prerogative being challenged is a prerogative exercisable on the advice of the Executive or is one which is personal to the Sovereign and exercisable in his untrammelled discretion. Support for this view can also be found in the authoritative text in administrative law — *De Smith's Judicial Review* (6th Ed), in which the learned commentators summarise the position thus:

> Despite the general shift away from jurisdiction to justiciability marked by the GCHQ case, they may still be some areas where the supervisory jurisdiction of the Court will still not run. First, some prerogative powers are exercised in the sphere of international relations and the Courts of England and Wales do not consider questions of pure international law as these are not, for the purposes of the national legal system, 'law' at all. Secondly, the prerogative powers of Royal assent to legislation may fall outside the Court's jurisdiction as being concerned with the processes of Parliament.
>
> Thirdly, in some circumstances the Court may lack jurisdiction because the prerogative power in question has been exercised directly by the Sovereign (rather than by Her Ministers) and as a matter of General Constitutional Principle, the Sovereign cannot be subject to legal process.
>
> These powers, called 'personal' or 'direct' prerogatives, 'can be exercised legally by the person of the monarch him or herself, (at p 129).

**[27]** These general principles, applicable in the United Kingdom, are of great persuasive authority, but ultimately the peculiar constitutional and statutory provisions under Malaysian law have to be considered in order to determine

this issue of justiciability. To this extent, I do not find the reference made to several Commonwealth decisions by counsel for the applicant particularly helpful. Emphasis was placed by counsel on a Federal Court of Appeal of Canada decision in *The Queen v Chiasson* (2003) 226 DLR (4th) 351 and a Supreme Court of Fiji decision in *Bavandra v Attorney-General* [1988] LRC 13. *Bavandra v Attroney-General*, with all due respect, falls more within the sphere of prerogative where the head of state has to exercise it upon the advice of the Executive. This was an extreme case where the Governor-General was argued to have acted beyond his strict powers within the Constitution of Fiji, dissolving or proroguing Parliament on his own volition, and simultaneously declaring vacant the offices of Prime Minister, Ministers, Speaker, Attorney-General and the leader of the opposition. The Prime Minister and his Cabinet together with members of the House of Representatives who supported him had been earlier arrested by the military forces. It was within this background that the court decided it had jurisdiction. In *The Queen v Chiasson,* the Canadian decision, the issue concerned the nomination by the respondent of his father for a Canadian bravery decoration. The conferment power rested with the Governor-General, and it was argued this involved the exercise of a royal prerogative on conferment of honours and awards which could not be reviewed. However, as the facts of this case show, the issue had become a matter regulated by regulations, namely the Canadian Bravery Decorations Regulations 1996 which set out a detailed procedure which required, inter alia, a submission to the Canadian Bravery Decorations Committee. It was within this context that the court held it was not plain and obvious that the committee's refusal to consider the nomination was not justiciable. The matter had become not a personal prerogative simpliciter, but more of a prerogative subject to defined and detailed rules and criteria. To this extent, this case is distinguishable on the facts and the law.

**[28]** As indicated earlier, the applicant's counsel, while conceding that His Royal Highness the Sultan's exercise of his prerogative under art VII of the Laws of the Constitution of Kelantan, Second Part, will not be non-justiciable, takes the position that when there is a purported exercise of the power under art VII by His Royal Highness the Regent, that exercise is justiciable. The position is argued to its logical conclusion, namely since the matter involves a question of constitutional interpretation, courts should have the jurisdiction to hear the matter and decide accordingly. The rhetorical question is put: who else can decide on an issue of constitutionality except a court of law? This argument separates function and subject matter from personality. With all respect due to the applicant's argument, it is difficult to accept how the subject matter which is accepted as non-justiciable can become justiciable only because a different person has exercised the discretion associated with the subject matter, which in this case is the general area of Royal Succession. Unless the constitutional provisions in the Kelantan State Constitution are very clear to the contrary, the entire subject matter should be regarded as non-justiciable. Under art IV(1) of

A the Laws of the Constitution of Kelantan, First Part, the term 'His Royal Highness' is defined as meaning 'the Sultan of the State and includes His Successors and, where the context admits, His Predecessors; and, in the case of a Regency, includes the Regent, or, if there is a Council of Regency, such Council'. This interpretation article no doubt has the qualifying words 'In this B Part, unless the context otherwise requires —', but can it validly be said that the context of art VII defines 'His Royal Highness' as excluding His Royal Highness the Regent? In this I agree with the respondents' counsel who argues that if such be the intention, the framers of the state Constitution would have used the term 'Sovereign' instead in art VII, Part 2. Indeed the state C Constitution uses the term separately in art XXIIA of Part 2 of the Constitution. In my view, it is very necessary to properly understand the context and intendment of this provision, and to this end, I quote it in full:

> (1) There shall be a Regency in the State under the following conditions, that is to D say —
>
> (a) if the Sovereign shall have occasion to be absent from the State for more than 30 days;
>
> (b) if the Sovereign shall be incapacitated from attending to the affairs of the E State; or
>
> (c) If the Sovereign is elected to the office, or exercise the functions, of the Yang di-Pertuan Agong for a period exceeding 15 days.
>
> (2) In the case of the intended absence of the Sovereign he shall appoint the Regent or Council of Regency as to His seems most expedient to exercise his functions F during his absence from the State.
>
> (3) In the case of the incapacitation of the Sovereign the Council of Succession shall appoint a Regent or a Council of Regency as to them seemed most expedient and if it shall be necessary to appoint the Council of Regency the provisions of clause (2) and (3) of Article XIX of this Part shall apply to such appointment. G
>
> (4) The Sovereign shall appoint a Regent Council of Regency as to him seems expedient to exercise His functions as Ruler in the event of His being elected to the office of Yang di-Pertuan Agong or of His exercising the functions of Yang di-Pertuan Agong for a period exceeding 15 days.
>
> H (5) Such Regent or Council of Regency shall cease to act upon the return of the Sovereign to the State or upon his recovery from incapacitation or his ceasing to hold the office or exercise the functions of the Yang di-Pertuan Agong, as the case may be.

I **[29]** It is to be noted that contextually, different terms are used depending on whether the Regent is appointed under (a), (b) or (c). In the case of 'intended absence', the Regent is to exercise 'His functions during his absence from the State'. In the case of the Sovereign being elected as Yang di-Pertuan Agong or exercising the functions of the Yang di-Pertuan Agong, the Regent is to exercise

'His functions as Ruler' during this period. No such limitations are imposed when the Sovereign is incapacitated. Contextually, one can only conclude that the Regent is intended to be constitutionally vested with all the necessary powers of the Sovereign during the period of incapacitation. The context certainly does not exclude the exercise of powers under art VII. Nevertheless, this power is temporary in nature and exists only during the period of incapacitation of the Sovereign. In this context, the definition of 'His Royal Highness' would validly require the inclusion and not the exclusion, of the Regent.

CONCLUSION

**[30]** Thus, principles, express constitutional provisons, relevant case authorities and learned commentaries therefore favour the position that the action of the Regent on the facts of this case should be non-justiciable. I accordingly find that the subject matter of this application for leave for judicial review to be inherently non-justiciable. In a matter such as this, involving as it does, the Council of Succession, and an exercise of law will be ill-suited to decide the dispute. Ultimately, the proper forum to resolve this dispute will be His Royal Highness the Sultan himself, once His Royal Highness is no longer incapacitated. This is the position taken by counsel for the respondents, and on this I am in full agreement.

**[31]** I therefore dismiss this application for leave for judicial review with costs to be taxed, unless agreed, to be paid by the applicant to the respondents and the Attorney General's Chambers. Order accordingly. I further order that encl 13 (an application by the applicant to amend the application for leave and statement under O 53 r 3(2)) be struck off, as a necessary consequence of my decision to dismiss the application for leave to apply for judicial review.

*Application dismissed with costs.*

Reported by Kanesh Sundrum